IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO. 492 OF 2004

Amrutanjan Limited .... Petitioner.

vs.

Shamrock International Ltd., ... Respondent.

Ms. N.S. Nippinai for petitioner.

Mr. K.A. Setalwad i/by Harilal Thakkar & Co. for company.

CORAM : S.U.KAMDAR, J.

DATE : 4th APRIL, 2005.

P.C.

1. The present petition is filed for winding up of the respondent company. The claim in the present petition is for a sum of Rs. 95,57,738/-. The present claim arises in respect of goods sold and delivered from time to time particularly during the period 16.8.2001 to 10.6.2003. The part payment has been received from time to time. Last such payment has been received on 15.11.2003 for the sum of Rs. 10 lacs.

2. Some of the material facts of the present

case briefly enumerated are as under :-

3. The petitioner company inter alia manufactures various products such as Cis (+) Hydroxy Lactum, Para Methyl Meracapto Benzyl Nitrile and various other chemicals. The respondent company is inter alia purchaser of the said products from the petitioner and in turn exports the said goods to various concerns. An agreement was entered into on 23.1.2002 between the petitioner and the respondent company. Under the terms and conditions of the said agreement various goods were sold and delivered by the petitioner to the respondent in respect of various items. It is the case of the petitioner that at the foot of the accounts there is an outstanding amount of Rs. 95,57,738/-. On 30.1.2004, a letter was addressed by the petitioner to the respondent company along with statement of outstanding and requested the respondent to pay the same.

4. On 12.3.2004, a statutory notice was given demanding the aforesaid payment along with interest at the rate of 18% per annum. On 16.4.2004, the respondent company replied the same and denied the liability to make payment to the petitioner as claimed by the petitioner in the present petition. In view of the aforesaid denial the petitioner filed the present petition. The petitioners have relied

upon the said statement of account of the outstanding claim in respect of the same to the tune of Rs. 95,57,738/-. The petitioner has also relied upon a letter dated 14.3.2003 addressed by the respondent to the petitioner in which the petitioners have forwarded the payment of Rs. 3,69,080/- in which it is inter alia stated that though the cheques are forwarded the same are not to be deposited till the confirmation is received from the respondent company permitting the petitioner to deposit the said cheques. Accordingly, another fax message dated 5.4.2003 was sent permitting the petitioner to encash the three cheques as mentioned therein. The petitioner has also relied upon a fax message dated 3.11.2003 in which according to the petitioner the respondent company has admitted payment of the balance outstanding amount of the sum of Rs. 48 lacs as due and payable as on that date.

5. The aforesaid petition is resisted by the respondent company by contending that the respondent company is not liable to make payment of the aforesaid amount as the respondent company is entitled to damages because of the delay in delivery of the said goods. It has been contended that the terms and conditions of the agreement inter alia stipulate that in case of delayed delivery, part delivery or non-delivery of the goods, the resulting claims, losses or damages, accrued to or sustained

by the buyer will be back-charged to the supplier's account. It has been contended by relying upon the aforesaid clause of the terms and conditions that the respondent company is entitled to set off and or counter claim by virtue of the claim for damages for delay in delivery of the goods. It has been also further contended by the respondent company that such delay in the delivery of the goods has in turn resulted in committing breach of the contract by the respondent company with various exporters and thus the respondent company has suffered a huge amount of loss in respect thereof and, therefore, the respondent company is not liable to make payment but on the contrary, the respondent company has counter claim for the delayed receipt of the said goods. The learned counsel for the respondent company has in support of the aforesaid contention relied upon the judgment of the Calcutta High Court in the case of J.N. Roy Choudhury (Traders) P. Ltd., v. Jainti Enterprises reported in 1987 Company Cases Vol. 61, page 504 and it has been inter alia contended that raising of a counter claim could be a bonafide defence and in view thereof the respondent company is not liable to make payment to the petitioner herein and thus consequently the winding up petition ought not to be admitted.

6. I have considered the aforesaid contention of the rival parties and I am not impressed by the

contention raised by the respondent company for various reasons. Firstly, the counter claim for damages is only and solely based on delay in delivery of the goods. At the time when the delivery has been effected by the petitioner, the respondent company was aware that the delivery of the said goods are delayed in spite of the same, the respondent company has not only accepted the goods but did not lodge any protest and/or raised any objection in respect of delay in delivery of the said goods. Not only that but even the said goods are not returned at any point of time by refusing to accept the same due to delay in delivery of the goods. The purported counter claim made in respect of delay in delivery of the goods is ex facie belated and after-thought. It was open for the respondent company either to refuse to accept the delivery of the goods or even at least prior to the statutory notice raise that objection about non-delivery of goods on time. The goods are being supplied from time to time. The payment has been outstanding from almost 2002. Inspite of the same, right till the reply to the statutory notice, no objections are raised in respect of the so called delivery of the goods inter alia indicating that the respondents are entitled to any claim for damages. On the contrary, the correspondence which has been annexed in the form of fax massages being letter dated 15.3.2002, 19.3.2002, 25.9.2002 and 2.11.2002

indicate that even though there was delay in delivery of the goods still the respondent company was willing to accept the same on supplies being effected. In the light of the aforesaid position, it is not possible to accept the contention of the respondent of so called counter claim in respect of the damages as valid and legal counter claim. Secondly, the counter claim raised is in the nature of damages. It is settled law that damages are required to be proved and till and until the damages are not proved, there can be no enforceable claim or set off as against the amount which are admittedly due and payable in respect of the goods supplied and delivered by the petitioner to the respondent company. Thirdly, even after delay in delivery of the goods, the goods are accepted and are not rejected. They are never returned back. It is not possible to accept the contention of the respondent company that though they have appropriated the goods still they are not liable to make payment in respect thereof. In view of the aforesaid, I find that there are no bonafide disputes raised by the respondent company. However, in the interest of justice, I direct as under :-

7. The operative part of the order was already pronounced in the open Court on 22.3.2005 which is as under :-

8. For the reasons separately recorded the respondent company is directed to deposit a sum of Rs. 50 lacs within a period of four weeks failing which the company petition do stand admitted. The said petition to be admitted. The petitioner to deposit with the Prothonotary and Senior Master a sum of Rs. 2000/- within a period of one week from today.

9. The admission of the petition to be advertised in two newspapers namely, Free Press Journal and Navshakti and Government Gazette. On the failure of the petitioner to advertise the said petition, office is directed to advertise the same by utilising the amount deposited.

10. In case the said amount is so deposited as directed hereinabove, the company petition to do stand dismissed and the petitioner to file a suit within a period of four weeks from the date of the communication of the deposit by the advocate for the respondent to the advocate for the petitioner. Such a suit to be filed within four weeks. If such a suit is filed then the deposit will go to the credit of the said suit. The Prothonotary and Senior Master, High Court, Bombay to invest the said amount in fixed deposit of any nationalised bank for a period of three years initially and to renew the

same from time to time till further orders. In an event if the suit is not filed within the stipulated period, the company will be at liberty to withdraw the amount after the expiry of the aforesaid period.

11. Petition disposed of accordingly.